Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-3897-00
MJGormley

date:

to: District Director, New England District
Attn: Thomas J. Higgins, LMSB Team Manager, Group 1653

from: Associate Area Counsel, (LMSB)
Area 1

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subject: [redacted]
UIL# 6901.00-00
Earliest Statute: [redacted]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in response to your request for advice regarding a waiver of the statute of limitations on assessment and collection by [redacted] ([redacted]) with respect to the taxable years [redacted] and [redacted].

ISSUE

1. What is the proper form and content of a waiver, where the taxpayer [redacted] merged into another corporation, [redacted], and [redacted]'s successor, then still named [redacted], underwent a merger into another corporation, [redacted] ([redacted]), with [redacted] surviving and [redacted] then underwent a further merger into a corporation that was ultimately named [redacted].

2. Is there transferor/transferee liability in this case? If so, what is the applicable statute of limitations under Massachusetts law?

CONCLUSION

The Service should obtain a Form 870 from [redacted], because [redacted] is the successor, after a series of mergers, to [redacted] ([redacted]) for the taxable years [redacted] and [redacted].

[redacted], as a surviving corporation in a merger, is secondarily liable as a transferee. However, we believe that the established facts will support the Service's primary reliance on [redacted]'s liability as a successor by merger under state law. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

FACTS

The taxpayer, formerly a Massachusetts business trust, was incorporated on [redacted]. The taxpayer is under examination for the years [redacted] and [redacted]. The taxpayer filed consolidated corporate returns (Forms 1120) for the years [redacted] and [redacted] in the name of [redacted] and Affiliates Corporations, using EIN [redacted]. Page 1 of both the [redacted] and [redacted] returns indicate they are consolidated returns and there is a schedule of affiliated corporations attached to each return. The business address of the taxpayer is listed as [redacted], [redacted], [redacted]. The statute of limitations for the [redacted] year will expire on [redacted] while the statute of limitations for the [redacted] year will expire on [redacted]. You anticipate closing this case as agreed for both years; and, due to various events which occurred after these returns were filed, you have requested our advice regarding the preparation of Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax. You have also requested our opinion as to whether there is any transferor/transferee liability in this case. If our understanding of the facts is not correct, or if the facts have changed in any way, you should not rely on this advice, but rather seek modified advice based on the changed circumstances.

The following description of transactions is based on the merger agreements and merger certificates provided by your office and your memorandum of June 27, 2000. A merger was effectuated pursuant to an Agreement and Plan of Merger ("Agreement") dated as of [redacted]. The parties to the Agreement were [redacted] ("[redacted]"), a Massachusetts business trust with EIN [redacted]; [redacted] ("[redacted]"), a Massachusetts business trust; and [redacted] LLC ("LLC"), a Massachusetts limited liability company which was directly and wholly owned by [redacted] with EIN [redacted]. In this transaction, LLC merged with and into [redacted] and [redacted] survived the merger. The Certificate of Merger, dated [redacted], stated that [redacted] would continue to use EIN [redacted]. As a result of the merger, [redacted] owned, directly or indirectly, all of the issued and outstanding common shares of [redacted]. The merger occurred pursuant to M.G.L. ch. 182 § 2 and M.G.L. ch. 156C § 59. Agreement Article I, sec. 1.01.

By virtue of the merger, membership interests in LLC were converted into shares of [redacted], and the former shareholders of [redacted] had the right to receive cash for their shares. At the effective time of the merger, each [redacted] percent of the issued and outstanding membership interests in LLC were converted into [redacted] transferrable certificate of participation or share of the surviving entity, [redacted]. Agreement, Article II., sec. 2.01(a). All issued and outstanding shares of [redacted] were canceled and converted into the right to receive "merger consideration", e.g., cash. Agreement, Article II., sec. 2.01(b)(i) and (ii). The Agreement provided that it was governed by and would be construed in accordance with Massachusetts law.

Thereafter, a second merger was effectuated pursuant to an Agreement of Merger dated [redacted] ("Second Agreement"). Under the Second Agreement, [redacted] (EIN [redacted]) merged with and into [redacted] ("[redacted]") (EIN [redacted]), a Massachusetts limited liability company organized on [redacted], [redacted]. [redacted] survived the merger and continued to use the EIN [redacted].

The Second Agreement stated that the merger of [redacted] with and into [redacted] was pursuant to the Massachusetts Limited Liability Company Act, M.G.L. ch. 156C § 59, and M.G.L. ch. 182 § 2. The Second Agreement stated that this merger was intended to qualify as a reorganization within the meaning of I.R.C. § 368(a)(1)(F), i.e., a mere change in identity, form, or place of organization of one corporation, however effected. Agreement of Merger, second paragraph. The separate existence of [redacted] ceased, except insofar as it might be continued in law or in order to carry out the purposes of the Second Agreement and except as

continued in [redacted]. Under the terms of the Second Agreement, [redacted] succeeded to the obligations of [redacted], and all debts, liabilities, and duties of [redacted] attached to [redacted].[1] Agreement of Merger, par. 4.c.

In this transaction, the outstanding equity of [redacted] was converted into membership interests in [redacted]. Each limited liability company membership interest in [redacted] issued and outstanding in the name of [redacted] and each common share of [redacted] outstanding on the effective date of the merger was canceled and retired as of the effective date. Agreement of Merger, par.3. a., b., and c.

A third merger was effectuated pursuant to an Agreement of Merger also dated [redacted] ("Third Agreement"). Under the Third Agreement, [redacted] (EIN [redacted]) was merged with and into [redacted] (EIN [redacted]) ("[redacted]"), a Delaware corporation organized on [redacted]. [redacted] survived the merger and continued to use the EIN [redacted]. The Third Agreement stated that the merger of [redacted] into [redacted] was in accordance with the applicable provisions of the Massachusetts Limited Liability Company Act, M.G.L. ch. 156C § 59, and the Delaware General Corporation Law, 8 Del. C. § 264 (1999).

In the Third Agreement, the outstanding equity of the constituent entities, [redacted] and [redacted] was converted into shares of [redacted]. Each limited liability company membership interest in [redacted] was canceled. Each share of [redacted] issued and outstanding in the name of [redacted] was canceled, but each share issued and outstanding in the name of any third person or entity other than [redacted] remained in effect. Agreement of Merger, § 3. a., b., and c. The Third Agreement stated that the merger of [redacted] into [redacted] was intended to qualify as a tax-free liquidation under I.R.C. § 332. Under the terms of the merger, [redacted] succeeded to the obligations of [redacted]. The Certificate of Merger provided that the surviving corporation would be [redacted].

LEGAL ANALYSIS

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[1] To qualify as a I.R.C. § 368(a)(1)(F) reorganization, one of the merged corporations would have to be a non-operating company. We assume for purposes of this advice that this requirement is satisfied based on information provided, because [redacted] appears to be a non-operating company organized for the sole purpose of merging with [redacted].

I.R.C. § 6213(a) provides restrictions on the assessment and collection of deficiencies. Generally, this section provides that a statutory notice of deficiency is a prerequisite to the Commissioner's assessment, and subsequent collection, of a tax deficiency. Subparagraph (b) of this Code section provides certain exceptions to this general rule. Specifically, I.R.C. § 6213(d) allows a taxpayer, at any time (whether or not a notice of deficiency has been issued) to waive, in writing, the above-described restrictions on assessment and collection. The regulations under this Code section do not specify who may sign such waivers; however the Service generally applies the same rules that are applicable to execution of the original returns to waivers and consents. A corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facia evidence that the individual is authorized to sign the return. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make assessments).

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name for all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its own name will give waivers, and any waiver so given, shall be considered as also having been given or executed by each subsidiary. Treas. Reg. 1.1502-77(a). Thus, generally, the common parent is the proper party to sign waivers, including the Form 870 Waiver of Restrictions on Assessment and Collection, for all members in the group. Treas. Reg. § 1.1502-77(a). Treasury Regulation § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temporary Treasury Regulation § 1.1502-77T provides exceptions to the general rule. Temp. Treas. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and

applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after [redacted]. Temp. Treas. Reg. § 1.502-77T applies to the years at issue in this case. However, Temp. Treas. Reg. § 1.1502-77T is inapplicable here because it applies only to waivers of the statute of limitations and to the mailing of statutory notices of deficiency, and not to waivers of the restrictions on assessment and collection. See Field Service Advice 199917016, n. 3 (Jan. 19. 1999).

On [redacted], LLC merged with and into [redacted]; [redacted] merged with and into [redacted]; and [redacted] merged with and into [redacted]. Each of the simultaneous mergers was pursuant to Massachusetts state law, and, in the case of the merger involving [redacted] and [redacted], Delaware law. As discussed below, [redacted] is liable as a successor under the Massachusetts merger law for the debts of [redacted], which in turn is liable under the Massachusetts merger law for the debts of [redacted]. Therefore, [redacted] is primarily liable for any and all debts of [redacted]. [redacted] is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of [redacted]'s consolidated group's tax liability for those periods in which it was a member of the group. Thus, [redacted] is primarily liable under state law for [redacted]'s several liability for the entire amount of [redacted]'s consolidated group's tax liabilities for the taxable years [redacted] and [redacted].

As set forth above, [redacted] is the successor in interest, after a series of mergers, to [redacted]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign a waiver on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448 (the surviving corporation may validly sign a consent to extend the period of limitations on assessment on behalf of the transferor for a period before the transfer). Successor liability may be established in this case.

Mass. Ann. Laws ch. 156B § 80 (2000) provides in part:

Effect of Consolidation or Merger.

...(5) all of the estate , property, rights, privileges, powers and franchises of the constituent corporations and all of their property, real, personal and mixed, and all the debts due on whatever account to any of them...shall be transferred to and vested in the resulting or surviving corporation...

(b) The rights of creditors of any constituent corporation

shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation, or any stockholder, director, or officer thereof, be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations....

Delaware General Corporation Law provides in part:

8 Del. C. § 259 (1999): Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation:

(a) When any merger or consolidation shall have become effective under this chapter... all rights of creditors and all liens upon any property of any said constituent corporation shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it tot he same extent as if said debts, liabilities and duties had been incurred or contracted by it.

The mergers of [redacted] with LLC with [redacted] surviving, and the merger of [redacted] with and into [redacted] were pursuant to Massachusetts corporate law. The merger of [redacted] with and into [redacted], was pursuant to Massachusetts corporate law and Delaware General Corporation Law.

If, as it appears, the merger of [redacted] into [redacted] was effected under Delaware law, then [redacted] is primarily liable for [redacted]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Under I.R.C. § 6901 and Treas. Reg. § 301.6901-1(b), a surviving corporation in a merger is also secondarily liable as a transferee, because a transferee at law includes a successor of a corporation. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather, it should generally be handled by asserting primary liability against the surviving

corporation.[2] We believe that the established facts will support the Service's primary reliance on [redacted]'s liability as a successor by merger under state law. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

We recommend that you obtain a Form 870 for [redacted] and [redacted] captioned as follows: "[redacted] (EIN: [redacted]), as successor in interest to [redacted] LLC II ([redacted]), successor to [redacted] (EIN: [redacted]),"*. On the bottom of the Form 870, you should add the following: "This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] (EIN: [redacted]) consolidated group for the taxable years ending December 31, [redacted] and December 31, [redacted].", As previously noted, this Form 870 should be signed by an authorized officer or director of [redacted], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.[3]

If you need further assistance, please contact the undersigned at 617/565-7858.

DAVID N. BRODSKY
Associate Area Counsel (LMSB)

By: _____
MICHELE J. GORMLEY
Senior Attorney

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[2] There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61.

[3] If you determine that [redacted] has sufficient assets to cover the consolidated group's tax liabilities, including interest and penalties if applicable, for the years in issue, you may choose to deal exclusively with [redacted] with regard to its primary liability as a successor of [redacted]. Conversely, if you determine that [redacted] does not have sufficient assets to cover the full extent of the liabilities that are owed, or if you prefer to deal with more than one entity, you may obtain Form(s) 870 from any or all of the former group members of [redacted] and Subsidiaries consolidated group, so long as they were members of the group in the tax years in issue.